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DOCKET FILE COPY ORIGINAL

April 1, 1998

Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W. - Room 222  
Washington, D.C. 20554

In re: CC Docket Nos. ~~95-57~~ <sup>97-56</sup> and 94-147

RECEIVED

APR - 2 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Ms. Salas:

On March 2, 1998, my client, Marc D. Sobel d/b/a Airwave Communications, submitted a *Revised Request for Inquiry and Investigation*, asking the Commission to institute an inquiry pursuant to Section 403 of the Communications Act into alleged abuses of process and possible violation of constitutional rights in connection with its investigation and prosecution of the CC Docket No. 95-57. Although Mr. Sobel intends his request to be a separate matter from the hearing proceeding itself, which is currently under consideration by the Commission on appeal, the subject matter of the request of necessity deals with the facts and circumstances in both of the above-referenced dockets. We are therefore mindful of the possible applicability of the Commission's *ex parte* rules.

We have just received a copy of a letter dated March 31, 1998, Rep. Elton Gallegly, of the United States House of Representatives, on behalf of Mr. Sobel, directed to the Commission's Inspector General, forwarding copies of the request and related documents. Mr. Sobel had expressly asked Rep. Gallegly any communications with the Commission regarding this matter be made in writing with copies served on the parties to the above-referenced proceedings. Rep. Gallegly's letter does not indicate whether such service was made. Out of an abundance of caution, we are submitting herewith for inclusion in the docket file for the above-captioned proceedings, copies of Rep. Gallegly's letter and a four page memorandum provided to Rep. Gallegly. Any additional information that Rep. Gallegly may have forwarded are already in the appropriate docket files and have already been served on the parties to the proceeding. Copies of this letter are also being served on the parties to the above-referenced proceedings.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,



Robert J. Keller  
Counsel for Marc D. Sobel

cc: Gary Schonman, Esquire  
Barry A. Friedman, Esquire

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**Congress of the United States**  
**House of Representatives**  
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IMMIGRATION AND CLAIMS  
COURTS AND INTELLECTUAL PROPERTY

March 31, 1998

H. Walker Feaster  
Inspector General  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Dear Mr. Feaster:

Enclosed is material from my constituent, Mr. Marc Sobel of Moorpark, California, regarding a license revocation proceeding before the Federal Communications Commission in WT Docket NO. 97-56.

While I am not in a position to comment on the merits of this proceeding, Mr. Sobel has asked me to forward the attached material to you for your review. As you can see, Mr. Sobel is requesting your review of the process that he claims has denied him equal protection under the law.

Your review of this situation would be appreciated.

Sincerely,

**COPY**

ELTON GALLEGLY  
Member of Congress

EG:jk

## **Marc D. Sobel d/b/a Airwave Communications**

### **Background**

Marc D. Sobel of Moorpark (Ventura) California who, doing business under the trade name Airwave Communications, provides two-way mobile radio communications services to over 60 businesses in the Los Angeles, California metropolitan area. His customers also include governmental organizations (e.g., the Metropolitan Transit Authority and the Santa Anna Unified School District) and charitable organizations (e.g., the American Red Cross). He is a small, one-man operation, and his revenues are less than \$200,000 per year. He relies upon licenses issued by the Federal Communications Commission ("FCC") to conduct his business.

Mr. Sobel is a lifelong resident of the Los Angeles metropolitan area. Upon high school graduation he attended Cal State University for approximately one and a half years. He and his wife have two children, boys, ages 8 and 10. Mr. Sobel has been an active volunteer for the American Red Cross for over 22 years, and is currently a leadership volunteer. He has actively participated in numerous disaster relief operations, taking extensive time away from his business and family. Some recent examples: In February of 1998 Mr. Sobel supervised the operation of a 1200 person shelter in Santa Cruz following severe floods; he served as a mass care coordinator in Pensacola, Florida, following Hurricane Opal; and in 1994 he was involved in the feeding operation following the Northridge, California earthquake. (Mr. Sobel's wife of 13 years is the Executive Director of the Ventura County Chapter of the American Red Cross.)

### **FCC Problems**

Mr. Sobel is currently the subject of license revocation proceeding before the FCC in WT Docket No. 97-56. For reasons explained below, Mr. Sobel believes he is being singled out by the staff of the FCC's Wireless Telecommunications Bureau ("Bureau") for unjustified and unreasonably harsh regulatory sanctions solely because of his friendship and business association with Mr. James A. Kay, Jr., another Los Angeles two-way mobile communications service provider. Mr. Kay is also the subject of license revocation proceedings in a separate proceeding, WT Docket No. 94-147.

### **Unreasonable Administrative Delay**

The Bureau initially improperly included some of Mr. Sobel's licenses in the Kay proceeding based on the mistaken belief that Mr. Sobel did not exist, but rather was a fictitious name being used by Mr. Kay to exploit the FCC's channel allocation policies. Even after this misconception was corrected and Mr. Sobel's licenses were removed from the Kay proceeding, the Bureau continued to withhold any action on various applications and other filings by Mr. Sobel. He repeatedly attempted to obtain information from the Bureau regarding the reason for this delay, and he even offered to travel to Washington, D.C. or to Gettysburg, Pennsylvania (where the Bureau's license processing staff is located) to meet with staff and answer any questions. His pleas were ignored. Out of desperation Mr. Sobel sought a judicial writ of mandamus to end this unreasonable regulatory delay. The Bureau's response to that was to immediately arrange for the designation of all of Mr. Sobel's licenses for a revocation hearing.

### **Improper Use of License Revocation Sanction**

The theory on which the license revocation was sought by the Bureau was that an agreement between Messrs. Sobel and Kay as to some of Mr. Sobel's licenses constituted a transfer of control of those stations to Mr. Kay without prior Commission approval. But there were a number of problems with the initiation of license revocation proceedings:

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**Notice:** The FCC proceedings referred to herein, WT Docket Nos. 97-56 (Sobel) and 94-147 (Kay) are subject to the FCC's regulations governing *ex parte* communications, Part 1, Subpart H of the FCC Rules and Regulations, 47 C.F.R. Part 1.1200 *et seq.* Any communication with the FCC regarding this matter therefore should be in writing with a copies to:

Gary Schonman, Chief, Compliance and Litigation Branch  
Enforcement and Consumer Information Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W. - Room 8308  
Washington, D.C. 20554-0002  
Telephone: 202-418-1795 / Facsimile: 202-418-2644

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1920 N Street, N.W.  
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- First, under Section 9(b) of the Administrative Procedure Act, before an agency may initiate license revocation proceedings, it must first give the licensee written notice of the alleged conduct warranting revocation and provide the licensee with an opportunity to achieve compliance. Mr. Sobel received no such notice.
- Second, even in situations not governed by Section 9(b) of the APA, the FCC's typical practice is to first issue to the licensee a notice of violation or, in severe cases, a notice of apparent liability for monetary forfeiture--or to otherwise afford the licensee an opportunity to explain and/or correct the violation. In Mr. Sobel's case the Bureau proceeded immediately to license revocation proceedings, with no advance warning.
- Third, and perhaps most important, the order designating license revocation proceedings against Mr. Sobel cited only one violation, namely, the alleged unauthorized transfer of control to Mr. Kay as a result of the management agreement. But the extensive, long-standing, and consistent FCC precedent is that an unauthorized transfer of control, unless it is coupled with other serious misconduct, e.g., an attempt to deceive the Commission, is not grounds for license revocation. The most severe penalty typically imposed for an unauthorized transfer of control is a \$20,000 monetary forfeiture.

### **False Accusation of Lack of Candor**

After the license revocation proceedings were under way, counsel for Mr. Sobel noted in a pleading regarding a discovery dispute that the alleged unauthorized transfer of control, even if proven, would not support the requested penalty of license revocation in the absence of a showing of other misconduct on Mr. Sobel's part. One week later Bureau staff sought and obtained the addition of a charge that Mr. Sobel had misrepresented or concealed facts from the Commission. The basis of this charge was an affidavit Mr. Sobel had executed in connection with the Kay proceeding in January of 1995. The Bureau maintained that the declaration was factually inconsistent with the management agreement between Messrs. Kay and Sobel.

Mr. Sobel vehemently denies any deceptive intent. Moreover, there is reason to doubt that the Bureau is being candid in leveling this charge against Mr. Sobel. It should be noted that Mr. Sobel relied on the advice of experienced communications legal counsel who drafted both the agreement and the affidavit within months of one another. Mr. Sobel certainly had no reason to believe that his own attorneys would ask him to sign an under oath statement that was inconsistent with an agreement they themselves had drafted. Both the affidavit in question and the written agreement have been in the Bureau's possession since early 1995. From that time until early 1997, the Bureau ostensibly (if we are to believe its own statements) was extensively investigating the relationship between Messrs. Kay and Sobel. But when the Mr. Sobel license revocation proceedings were designated in February of 1997, no charge of misrepresentation, lack of candor, or inconsistency between the affidavit and the agreement was made. This charge was not made until one week after the Bureau was reminded that its lone allegation of unauthorized transfer of control would not support the penalty of license revocation.

### **Disparate Treatment of Mr. Sobel Compared to Enemies of Mr. Kay**

In November of 1997, an FCC administrative law judge, based on the Bureau's false allegations and accusations, recommended revocation of Mr. Sobel's licenses. Mr. Sobel has timely appealed that decision and the matter is under consideration by the full Commission.

On March 2, 1998, Mr. Sobel filed a separate request asking the Commission to initiate an investigation or inquiry, pursuant to Section 403 of the Communications Act, 47 U.S.C. § 403, into possible misconduct by the Bureau staff in connection with the proceeding. In addition to the matters discussed above, Mr. Sobel presented a fully

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substantiated (relying on documents of official record, transcripts of sworn testimony, sworn declarations, etc.) showing that the Bureau has engaged in the selective persecution of Mr. Sobel because of his friendship and business association with Mr. Kay.

In his request for investigation, Mr. Sobel detailed four examples of Los Angeles two-way mobile radio licensees who have been conclusively demonstrated to the Bureau to have engaged in conduct far worse than that which Mr. Sobel has been accused of, and yet the Bureau has taken no enforcement action whatsoever against these licensees. In some cases the Bureau has even taken actions affirmatively favorable to these licensees. In each case the licensee or its principal is an informant, complainant, and/or witness against Mr. Kay. Meanwhile, the Bureau seeks the severest of regulatory sanctions against Mr. Sobel, a friend and business associate of Mr. Kay, for lesser alleged wrongs and on far less evidence. In effect, it appears that the Bureau is using its regulatory power to reward Mr. Kay's enemies and to punish Mr. Sobel, his friend.

Here is a brief summary of the four examples documented in Mr. Sobel's request for investigation:

- Harold R. Pick. Mr. Pick is one of the chief informants against Mr. Kay and a competitor of Messrs. Sobel and Kay in the Los Angeles two-way mobile radio business. The Bureau has known at all relevant times that Mr. Pick is one of Mr. Kay's primary business enemies. In October of 1994 Mr. Sobel conclusively demonstrated to the Bureau that Mr. Pick had presented a blatantly false sworn statement to the Commission, and that Mr. Pick and his father had falsified documents in support of the false statement. Mr. Pick never denied the allegation. Indeed, when asked about it during a subsequent deposition, he invoked his Fifth Amendment privilege against self-incrimination. The Bureau to date has taken no action against Mr. Pick regarding this matter. Indeed, at one point in 1995, the Bureau unlawfully reinstated to Mr. Pick properly canceled and expunged authorizations in violation of the FCC's rules and in direct interference with the rights of the trustee and creditors in a bankruptcy proceeding. Thus, the Bureau rewards Mr. Pick for a conclusively demonstrated and undenied perjured statement and falsification of documents, while seeking to persecute Mr. Sobel based on an arguable interpretation of possibly ambiguous language in an affidavit and over Mr. Sobel's vehement denial of deceptive intent.
- James Doering. Mr. Doering is another Los Angeles two-way mobile radio licensee who is a complainant and informant against Mr. Kay. In May of 1997 a formal complaint was filed with the Bureau conclusively demonstrating that Mr. Doering filed with the FCC an assignment of license application which he knew or should have known contained false statements and falsified documents. By these actions Mr. Doering was able to acquire a license that rightfully belongs to United Corporation of Southern California without the licensee's knowledge or consent. Although not required to do so prior to service by the Bureau, Mr. Doering responded to the complaint, but he did not deny any of the operative facts. The Bureau has not even formally served the complaint. Meanwhile, on information and belief, Mr. Doering has entered into an agreement with Nextel to cancel his authorization in exchange for monetary payment. Once again, the Bureau feigns deep concern about an alleged lack of candor on the part of Mr. Sobel, but it simply yawns in the face of conclusively documented and undenied misrepresentation and falsification of documents by Mr. Doering. The only apparent explanation for such disparate treatment is that Mr. Doering, unlike Mr. Sobel, is willing to say the bad things about Mr. Kay that the Bureau wants to hear.
- Liberty Paving, Inc. Liberty holds a two-way mobile radio authorization that is co-channel with one held by Mr. Sobel. Under applicable FCC regulations, if such a station is off the air for more than a year, it automatically cancels and should be deleted from the database by the Bureau. In January of 1997, Mr. Sobel wrote to the Bureau asking that the Liberty license be so expunged, and he provided as justification the sworn deposition testimony of Charles F. Barnett, Liberty's principal, admitting that the station had been inactive since the fall of 1994. Liberty did not oppose this request (unless it did so in an improper ex parte communication), but the

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Bureau still has not deleted the license. The Bureau's improper refusal to delete the Liberty license adversely impacts the value of Mr. Sobel's authorization. On information and belief, Mr. Barnett has engaged in discussions regarding possible sale of the authorization. Mr. Barnett is an informant and complainant against Mr. Kay, and he is currently scheduled to be a witness for the Bureau in the Kay revocation hearing. It thus appears that the Bureau is improperly permitting Liberty to retain and possibly sell an invalid authorization because of his willingness to testify against Mr. Kay. In a recent deposition Mr. Barnett admitted, under oath, that he lied in a written statement to the Bureau in which he claimed to have a tape recording of Mr. Kay incriminating himself. Mr. Barnett further admitted that he made this false statement in the hopes that it would influence the Bureau to act in his favor in a licensing proceeding. Yet the Bureau chooses to rely on Mr. Barnett as a witness against Mr. Kay, possibly rewarding him financially for the chore, while all the while prosecuting false lack of candor charges against Mr. Sobel.

- Christopher C. Killian. Mr. Killian is yet another Sobel/Kay competitor and informant and complainant against Mr. Kay. Mr. Killian has been named by the Bureau as a potential witness against Mr. Kay. In June of 1996 the Bureau was presented with evidence that Mr. Killian had not timely constructed a station, which should, under applicable regulations, have resulted in the cancellation of the license and its deletion from the database. Instead, the Bureau allowed Mr. Killian to retain the authorization. In approving Mr. Killian's later sale of the authorization to Nextel, the Bureau did not seek the certifications of timely construction it normally requires for such applications. More recently, the Bureau has been presented with evidence, based on the sworn deposition testimony of Mr. Killian's wife, that he used his wife as a shill to obtain more channels than he was entitled to, thereby failing to disclose his status as real party in interest in an application, i.e., he misrepresented to and lacked candor with the Commission. Mr. Killian has not denied the allegations, but the Bureau has taken no action whatsoever against him. This can not be squared with the Bureau's treatment of Mr. Sobel.

### Conclusion

Mr. Sobel understands and fully appreciates that an administrative agency must be afforded a certain degree of prosecutorial discretion in the exercise of its enforcement functions. But with discretion comes the responsibility not to abuse it. In this case the Bureau abused its discretion in several ways. First, the Bureau departed from its typical--and violated the APA--by not advising Mr. Sobel that he was suspected of something improper and giving him an opportunity to explain and/or correct the alleged misconduct. Instead, the Bureau proceeding straight to license revocation proceedings with no preliminaries. Second, the Bureau initiated license revocation proceedings on grounds that, under long standing and consistent FCC precedent, do not warrant revocation. Third, the Bureau belatedly introduced against Mr. Sobel false charges of misrepresentation and lack of candor.

The repeated examples of the Bureau turning a blind eye toward the documented serious violations by Mr. Kay's enemies stands in stark contrast to its uncharacteristically harsh treatment of Mr. Sobel, Mr. Kay's friend.

Finally, the Bureau's selective prosecution has deprived Mr. Sobel of his Constitutional due process right to equal protection of the law. The Bureau has taken no enforcement action against Messrs. Pick, Doering, Barnett, and Killian even though it is fully warranted and long overdue. This is not merely the product of administrative delay occasioned by a heavy caseload and a light budget, nor is it a coincidence that each of these gentlemen is an informant, complainant, or witness against Mr. Kay. The fervor with which the Bureau staff persecutes Mr. Sobel, a friend and business associate of Kay, speaks loudly that he is being inequitably and unlawfully discriminated against precisely because of the Bureau's animus toward Mr. Kay. In this country, however, we do not engage in assignment of guilt (or even prosecution) by association.

We urge you to assist us in our effort to obtain a comprehensive Commission investigation of the Bureau's conduct in this matter.

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